

Au revoir to Neoliberalism?

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La Doctrine in Denial and the Missing Distributive Analysis

This symposium addresses the alternatives to the neoliberal paradigm that once globalized by the [Washington consensus](#) has been accused by scholars to be at the core of all injustices especially in economic, criminal, consumer law and even behind the [rule of law crisis in Europe](#). Many authors who have been thinking how the neoliberal paradigm is embedded in legal regimes have written in the [Law of Political Economy](#) by showing along a U.S. and European [CLS tradition](#) how law and political economy are mutually constituted in a variety of fields such as jurisprudence, international, administrative, private law and through an array of theoretical approaches in legal scholarship or *la doctrine*.

Poul F. Kjaer, the editor of the volume, maps the masters of law and political economy evolving from different political and methodological traditions and re-positions them along an elegant [dichotomy between holism and differentiation](#). The politics of law change in Kjaer's chapter alongside the history and political phases that follow in the wake of WWI, characterized by corporatism, neo-corporatism and governance, in its neoliberal flavor, influencing styles and discourses of *la doctrine*. The rest of the volume takes a post-WWII and post-[integration through law approach](#) that is in tension with those scholars who aimed at securing a supranational legal order through good governance and constitutionalism under a quasi-federal structure led by a technocratic Commission and an heroic European Court of Justice with a limited focus on political economy and the entrenchment of the neoliberal paradigm in law.

Distributional Struggles

For instance, [David Kennedy's contribution](#) sheds light on how international and European legal elites innocently concealed distributional struggles in name of order, governance, judicialization and balancing between neoliberalism and solidarity. Christian Joerges and Michelle Everson recall in their chapter how the legal dimension of the economic constitution was re-defined by a "[very German](#)" [political and methodological struggle](#) between the Hayekian Ernst-Joachim Mestmäcker and the unorthodox progressive Rudolf Wiethölter, both carrying on their shoulders the legacy of the ordo-liberal school of Franz Böhm. The [politics of European private law](#), as Hans Micklitz recalls in his apologetic contribution, were influenced by the changes in the political economy of the Community: by the late 1970s the welfare states of the Member States had become the target of the "failure rhetoric" by neoliberal politics, but many progressive scholars still believed in a powerful comeback of Social Europe. Differently from European labor law where, as

Stefano Giubboni shows, the reconfiguration of the struggle of capital *versus* labor happened at the expense of the latter, especially in [the “weaker Member States of the Eurozone,”](#) European consumer law was more complex and layered due to the resurgence of Social Europe in the 1990s and the neoliberal turn of the Lisbon agenda in 2000.

Marija Bartl’s chapter depicts powerfully these competing [socio-economic imaginaries](#) in EU private law shifting from social to neoliberal visions pursuing different legal agendas put forward by the Commission. Until 2010, when the neoliberal turn in EU policies became the orthodoxy, vague legal concepts based on fairness and efficiency, rather than distributive consequences, kept the dream of Social Europe alive. Duncan Kennedy’s [hermeneutic of suspicion in contemporary legality](#) highlights how scholars, just like corporate lawyers or judges, were abusing the legal method to achieve their political agendas without openly engaging with the [distributive consequences](#) of legal reforms.

The oscillation between a social or a neoliberal paradigm in law as it appears prominently in this volume brings me back to my dissertation years when, between Trento (Italy) and Cambridge (U.S.), I was trying to map the role of [la doctrine](#) in the political economy of EU consumer law from the mid-1980s to the late 2000s. Following the Single European Act of 1986, the European Community was rushing towards the completion of the Single Market through numerous harmonization directives which led to battles by lobbies and Member States’ representatives in Brussels, followed by the interpretative struggles before the European Court of Justice in Luxembourg amplifying the claims of [Euro-Lawyers](#) and domestic judges [shaping the field of EU law](#). But my puzzlement was always: where were European and private law scholars while these struggles were taking place in Brussels, Luxembourg and Barcelona? Perhaps rather than on the battleground, legal scholars were still, per Von Jhering’s image, in a dreamed-up heaven of legal concepts, or worse, were in denial on how law and political economy operated on the ground.

The Lack of a Distributive Analysis in EU Consumer Protection Law

The paradox at the heart of my doctoral research was the lack of a distributive analysis in the doctrinal work on consumer protection at a time when the field was shifting rapidly from the domestic to the European level with enormous but unaddressed distributive effects. My hunch was that scholars were caught in their ideological division between efficiency *versus* social goals, maximum *versus* minimal harmonization and neoliberalism *versus* welfarism in a way that continued to ignore the distributive effects of consumer law. They would set aside distribution either under cover of a meaningless general formula such as unfairness in consumer contracts or, later on, through the turn to human rights and the constitutionalization of private law. Additionally, these scholars were advocating market efficiency by importing, as part of their dream, U.S. mainstream law and economics, all while losing sight of the [legal strategies that corporate lobbyist in Brussels](#) were advocating for with devastating outcomes for consumer protection. While corporate

lobbyists successfully managed to dilute the products liability directive based on efficiency, autonomy and equal protection for producers' rhetoric, progressive scholars appeared blind to this development because of their faith in [Social Europe](#) and their vague notions of fairness. My critique of these doctrinal approaches grappling with social, ordo-liberal or law and economics schools of thought was that they were out of sync with the distributive effects of the existing European consumer law. In contrast with corporate lobbyists, domestic judges and Euro-lawyers embedded in the legal struggles for European consumer protection, scholars were either pleasantly surprised or infuriated by the distributive consequences arising from the implementation of the directives and [the judgements of the ECJ](#).,

In my [Transatlanticism](#) article, I created a consumer protection test showing how the European private law *doctrine*, relying only on the vague formula of "social-market economy," had completely missed the distributive consequence of European consumer law. I constructed a formal analytic through historical and doctrinal comparisons of U.S. and EU consumer law. My encounter with distribution in [U.S. consumer protection](#) combined two critiques of EU consumer law scholarship. The first one was a critique of fairness, as the protection of the weaker party, promoted by progressive scholars. The second one was a critique of efficiency, promoted by neoliberal and anti-dogmatic scholars who were selectively receiving U.S. mainstream law and economics out of context. My distributive analytic engaged with two European directives on the [liability for defective products](#) (1985) and the [unfair contract terms directive](#) (1993). During my doctoral research I found out that European scholarship on both directives was simply disengaged when addressing their distributive effects on different consumer groups throughout the European jurisdictions.

The basic idea was to show how changes in legal regimes embedded in the European political economy had distributive consequences that were often counter intuitive and unevenly impacted consumers in Spain, Denmark, France or Germany due to mobilization of domestic judges in Spain or the existence of different public health regimes throughout the EU Member States. Let me explain in three steps how my irreverent distributive analytic provided a timely critique of European scholarship on consumer law and policy.

Denial of the Distributive Analysis

My first step was a critique of the *la doctrine* and the fact that scholars addressing consumer protection were in denial because they suppressed any overt discussion of the distributive dimension of European consumer law. The thinking on distribution in EU consumer protection law began with a well-documented argument that there was nothing about distribution in a field such as consumer law, which desperately needed it. The two dominant ideals motivating the academic discipline were fairness and efficiency, but once elevated at the European level, consumer law became overtly a-political like a *panacea* for the struggle between producers *versus* consumers. The potentially acrimonious battles between scholars committed to a 'social' market for the EU and those pursuing the objective of a 'free' market gave way to a truce in the name of a politically undefined EU consumer law. In the hands

of the clever and technocratic Commission, EU consumer law became a coherent project about consumers as a collective identity who were able to move and shop across borders. The scholarly denial of any distributive implication went hand-in-hand with the ability of academics to dismiss the issue of winners and losers among different consumer groups, different social classes, men and women, northerners and southerners, or the rich and the poor.

Recognition of the Distributive Analysis

The second step in my analytic was to map how the idea that distribution was gradually entering the discourse of private law scholars and yet, at the same time, nothing like a rigorous distributive analysis was emerging. During this time, *la doctrine* was either still in the heaven of legal concepts or in denial because fairness or efficiency carried absolutely no distributive analysis in practice. Among these academics, [Thierry Bourgoignie](#), who had studied with [Arthur Leff](#) at Yale Law school, one of the [first critics](#) of mainstream law and economics, in 1984 alongside [David Trubek](#) published a book that sketched what they called a “modern political economy approach to consumer protection”. Bourgoignie and Trubek focused predominantly on federalism rather than distribution and lamented the lack of a Ralf Nader in European academic circles. Bourgoignie also advocated for the creation of a collective [identity of European consumers](#) while also being involved in the drafting of the EC directive on liability for defective products. Although he was obviously aware of the progressive distributive consequences of this directive, this did not stop the corporate lobbies, empowered by the 1980s market integration rhetoric and fearful of U.S. class actions, to water down some of the key provisions of the directive, allowing for scientific and privity of contract exceptions. Not surprisingly, when transposed into the domestic private law regimes, the EC product liability directive created, as anticipated by Daniela Caruso, [national resistance](#) among domestic private law elites. And again unsurprisingly, [Hugh Collins](#), who had rejected the pervasiveness of the rule of law rhetoric [obscuring class domination](#), was one among [the few progressive scholars disenchanted](#) by the EU unfair contract terms directive. Yet Collins’ main contribution only entailed the abandoning of a procedural vision of [distributive justice in contract law](#) in favor of a substantive one which contained no distributive analysis. Finally, the slow reception of mainstream U.S. law and economics in European scholarship through comparative law led some scholars to reject the “forced harmonization” of European contract law, not because of a distributive analytic but rather a blind faith in autonomy, [efficiency](#) and [subsidiarity](#). To my dismay, scholarship by the [fathers and mothers of consumer law](#) lacked a robust matrix addressing the distributive outcome of European consumer law, and this was so striking I offered a sharp critique on how the academic consumer law discourse merely ignored distribution as a whole.

Application of the Distributive Analysis

The third step, an applied illustration of my analytic, proved inevitable. As time passed, the uneven enforcement of the two harmonizing consumer directives made their regressive and progressive distributive consequences more visible. As to the

progressive effects, the unfair contract terms directive's vague fairness criteria allowed a judge of first instance in Barcelona to make some initial distributive moves. When a case concerning an unfair term in the standard contract for the sale of an encyclopedia reached the European Court of Justice, the Spanish and European judiciary ushered in unexpected progressive distributive consequences. This [led to a second life in protecting consumers against the Spanish mortgage defaults](#) after the 2008 financial crisis. As to the regressive effects, the products liability directive, which included carve-outs, requested on grounds of efficiency by producers and corporate lobbies, allowed both national and EU courts to take away certain forms of consumer protection. For instance, harm from defective products including infected blood, depending on the types of public health regimes in the Member States, could leave consumers without public redress or private damages as it had happened in Spain but not in Germany.

Step by step, this analytic framework allowed me to interpret the changes in law and political economy brought about by EU consumer protection by anticipating the possible distributive consequences of the two directives. Despite the indeterminacy of legal norms, what was at stake was the doctrinal denial that either fairness or efficiency could be used to predict the distributive effects of EU consumer protection. And such distributive effects could have not been anticipated without taking into consideration the political conjunctions of Social Europe and the neoliberal turn of the Lisbon agenda, as well as the mobilization of the corporate lobbyists in Brussels and the domestic judges in Southern Europe. If the lobbyists and the judges knew very well what they were doing, *la doctrine* was in denial. While other actors struggled, driven by their interests and beliefs, to shape and interpret the text of the directives, the doctrine kept on dreaming. In their dreams, European scholars could not and would not engage with the distributive consequences of the directives, except when the wakeup call was: "you are hurting the people you are trying to help", meaning that the poor had been injured by EU consumer protection.

Law and the Neoliberal Paradigm

Through these three steps consisting in *denial, recognition and application* of the distributive analysis, I showed how the powerful phenomenon of denial of *la doctrine*, stuck in a neoliberal or social paradigm, could survive untouched during the Europeanization of consumer law. This denial did not mean that scholars were not aware of distributive effects in EU consumer law, but that they could not fully engage with these effects as that would reveal they were playing another game, a political game on the ground that domestic judges and corporate lobbies were fully engaged with.

In mapping the interaction between law and political economy it becomes clear that the neoliberal paradigm is still pervasive in law, especially in [competition law](#), [private administrative law](#) and [natural resource extractions](#). Rather than addressing what comes after neoliberalism, as a paradigm shift, I would suggest that scholars engage with a more rigorous distributive analysis grounded in empirical findings through which they can grasp whether the oscillation between neoliberal and social paradigms in law produces the proclaimed distributive consequences.

